Office - Supreme Court, U.S.
FILED
NOV 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-372

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALAN FRIEDRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Arbelaez*, 719 F.2d 1453 3

United States v. *Brito*, 721 F.2d 743 ..... 3, 4

United States v. *Read*, 658 F.2d 1225 ..... 3, 4

United States v. *Snider*, 720 F.2d 985, cert. denied, No. 83-6236 (Mar. 19, 1984) 3

United States v. *Young*, 736 F.2d 565, cert. granted, No. 83-469 (argued Oct. 2, 1984) 4, 5

Statutes:

21 U.S.C. 846 1

21 U.S.C. 848 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-372

ALAN FRIEDRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence at trial was insufficient because it established petitioner's participation in a conspiracy other than the one alleged in the indictment. He also claims that he was prejudiced by the prosecutor's rebuttal argument, which the court of appeals held was a proper reply to the closing arguments of petitioner's co-defendants.

1. After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted of conspiracy to possess and distribute marijuana and cocaine, in violation of 21 U.S.C. 846. He was sentenced to six years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. 1-61; 736 F.2d 571).

a. The evidence showed that Marvin R. (Rusty) Hall, and numerous other individuals conspired to possess and distribute large quantities of marijuana and cocaine in

Oklahoma, Colorado, and New Mexico between June 1977 and April 1982.[1] In furtherance of this scheme, petitioner sold a kilogram of cocaine to co-conspirator James Clanton on two occasions in Miami, Florida in May 1980. The total purchase price for the cocaine was $110,000. Jo Hall, Rusty Hall's ex-wife, who had told Clanton that she was Rusty Hall's source for cocaine and that petitioner was her "connection," was present with petitioner on both occasions. In addition, a search of Rusty Hall's house disclosed that petitioner's telephone numbers were listed in Hall's records, and telephone company toll records revealed that over a two-year period, from April 1980 through April 1982, some 51 calls were made from petitioner's residence to Rusty Hall's telephone and another six to Clanton's home. Pet. App. 9-10, 18-19.

b. On appeal, petitioner contended, inter alia, that the evidence at trial demonstrated the existence of multiple conspiracies, rather than the single conspiracy alleged in the indictment, and that the evidence was insufficient to support his conviction for the conspiracy charged. The court of appeals rejected this argument, concluding that the evidence showed the existence of a scheme having a common goal and established the requisite interdependence between the defendants, and that the jury properly determined that petitioner was guilty of participating in the single conspiracy charged in the indictment (Pet. App. 11-15, 17-19). Petitioner also challenged certain comments in the prosecutor's rebuttal argument, but the court of appeals held that

---

[1]In addition to Hall, nine individuals, including petitioner, were charged with, and convicted of, conspiracy; three others were named as unindicted co-conspirators. Hall was also convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

these comments constituted a fair reply to the arguments of counsel for petitioner's co-defendants (*id.* at 37-49).[2]

2. Petitioner contends (Pet. 6-15) that the evidence showed several conspiracies rather than the single conspiracy alleged in the indictment, and that the court of appeals should have concluded that the evidence was insufficient to convict him of the single conspiracy charged. In this regard, petitioner claims that the standard applied by the court below in concluding that petitioner was properly convicted of participating in a single conspiracy conflicts with that used by other courts of appeals. In fact, no conflict exists. Consequently, further review of this fact-bound claim is unwarranted.

Petitioner is incorrect in asserting that several other circuits would hold that the evidence below established multiple conspiracies. The cases on which he relies (Pet. 10-14) —*United States* v. *Brito*, 721 F.2d 743, 747 (11th Cir. 1983); *United States* v. *Snider*, 720 F.2d 985, 988 (8th Cir. 1983), cert. denied, No. 83-6236 (Mar. 19, 1984); *United States* v. *Arbelaez*, 719 F.2d 1453, 1457-1458 (9th Cir. 1983); *United States* v. *Read*, 658 F.2d 1225, 1230 (7th Cir. 1981) — simply stand for the unremarkable proposition that where defendants have been charged with participation in a single conspiracy, the proof at trial must show one overall agreement and establish that each defendant performed a function in furtherance of the goals of that conspiracy. This is precisely the test that the court below applied (see Pet. App. 12-13). Moreover, the cases on which petitioner relies also emphasize that the determination whether single or multiple conspiracies were proven is a jury question, and that the jury's

---

[2]Judge McKay dissented in part (Pet. App. 57-61). He would have reversed petitioner's conviction because he was of the view that the government failed to demonstrate that petitioner was part of the overall conspiracy charged in the indictment.

conclusion can be reversed only if the record shows that no reasonable jury could have found a single conspiracy. See, *e.g.*, *Brito*, 721 F.2d at 747; *Read*, 658 F.2d at 1231. Hence, the court below applied the proper standard in rejecting petitioner's claim.

3. Petitioner also argues (Pet. 15-19) that the court of appeals should have reversed his conviction because of allegedly improper comments in the prosecutor's rebuttal argument. Petitioner acknowledges that the court below determined that the challenged comments were invited by the closing arguments of petitioner's co-defendants. He contends, however, that because his attorney did not invite the prosecutor's responses, he is entitled to reversal based on the prosecutor's remarks.

Despite petitioner's present claim, there is no indication that he specifically objected during the prosecutor's rebuttal argument (see Pet. App. 40-42). Under these circumstances, petitioner should not now be permitted to assert that he was prejudiced by an argument that the court below found was justified as a proper response to defense provocations. Moreover, the district court sustained defense objections (raised by counsel for one of petitioner's co-defendants) to the prosecutor's statements and promptly admonished the jury to disregard one such statement when requested to do so (*id.* at 41, 42, 48).[3] This case is therefore materially different from *United States* v. *Young*, 736 F.2d 565 (10th Cir. 1983), cert. granted, No. 83-469 (argued Oct. 2, 1984), where no defense objections were raised and where the

---

[3]There plainly is no merit to petitioner's additional claim (Pet. 17) that he is entitled to reversal because of other allegedly improper statements by the prosecutor in his closing arguments. The court of appeals properly rejected this claim, ruling that whenever defense objections were raised in response to such comments, the district court took appropriate curative measures (Pet. App. 48-49).

district court thus had no similar occasion to consider alleged improprieties in the prosecutor's argument, sustain objections, or admonish the jury to disregard the prosecutor's statements found to be improper. Because the court of appeals here rejected petitioner's claim after expressly considering its own earlier decision in *Young* (see Pet. App. 46), we believe that, whatever its outcome in this Court, *Young* provides no basis for further review of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11